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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 1310

BENJAMIN F. MARLOWE, *Petitioner,*

vs.

J. FRANK COAKLEY, et al., *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents oppose the petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed in the above entitled cause.

OPINIONS IN THE COURTS BELOW

The opinion of the Court of Appeals is reported in 404 F.2d 70 (1969).

QUESTIONS PRESENTED

1. Is the presentation by a prosecutor of evidence to a Grand Jury an integral part of the judicial process?

2. Is a prosecutor immune from liability for acts performed as an integral part of the judicial process?

3. Have the traditional common law immunities been abrogated by the Civil Rights Act?

4. Does prosecutorial immunity implement a desirable public policy goal?

STATEMENT OF THE CASE

Petitioner Benjamin F. Marlowe, an attorney in Oakland, California, was indicted for grand theft on February 17, 1965 by the Alameda County (California) Grand Jury. He was later acquitted of the charge after trial by jury.

On July 20, 1966, Petitioner filed suit in the United States District Court for the Northern District of California, in San Francisco, alleging, in essence, that Respondents herein had violated his civil rights by wilfully and knowingly presenting perjured testimony to the Grand Jury, and by wilfully and deliberately withholding testimony favorable to Petitioner from the Grand Jury. The complaint sought damages in the amount of $45,000,000.

Respondents moved for dismissal of the complaint on the ground that prosecuting attorneys are immune from suit for acts performed as an integral

part of the judicial process, and that the presentation of evidence to a Grand Jury is such an act. District Judge George B. Harris granted Respondents' motion. On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the ruling of the District Court, and thereafter denied Petitioner's petition for a rehearing.

Petitioner, by reiterating in wholly conclusory terms the essential allegations of his complaint has petitioned this court for a writ of certiorari, contending the Court of Appeals, "completely evaded the issues." *Petition,* p. 3 (April 21, 1969).

REASONS FOR DENYING THE WRIT

1. THE ACTS UPON WHICH THE COMPLAINT IN THE PRESENT CASE IS PREDICATED ARE AN INTEGRAL PART OF THE JUDICIAL PROCESS.

In California, the District Attorney is the public prosecutor and conducts, on behalf of the people, prosecutions for public offenses. *Calif. Gov't Code,* § 26500. This duty is mandatory, not discretionary. *City of Merced vs. County of Merced,* 240 Cal. App. 2d 763, 766 (1966). Among the duties specifically delegated to the public prosecutor is the presentation of evidence to the Grand Jury. *Calif. Gov't Code,* § 26501; *Calif. Penal Code,* § 925.

Since the presentation of evidence to the Grand Jury is a duty specifically delegated to prosecuting attorneys in California, it is apparent that the acts complained of in the present case by Petitioner are

within the ambit of the prosecutor's official capacity and are an integral part of the judicial process.

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2. PROSECUTING ATTORNEYS ARE IMMUNE FROM LIABILITY FOR ACTS PERFORMED AS AN INTEGRAL PART OF THE JUDICIAL PROCESS.

It has long been recognized with respect to prosecutorial officials:

> The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the Government should speak and act freely and fearlessly in the discharge of their important official functions. [*Yaselli vs. Goff,* 12 F.2d 396, 406 (2d Cir. 1926), affirmed per curiam, 275 U.S. 503 (1927).]

Accordingly, prosecuting attorneys have absolute immunity from liability for the performance of acts constituting an integral part of the judicial process. *Robichaud vs. Ronan,* 351 F.2d 533, 536 (9th Cir. 1965). The immunity is in no way lessened because a purportedly aggrieved party asserts that the conduct of the prosecutor was motivated by malice or ill will. *Yaselli vs. Goff, supra,* and cases cited therein. See, also, 56 A.L.R. 1239, 1255-56 (1928).

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3. THE TRADITIONAL COMMON LAW IMMUNITIES HAVE NOT BEEN ABROGATED BY THE CIVIL RIGHTS ACT.

The traditional common law immunities have not been abrogated by the Civil Rights Act. *Tenney vs. Brandhove,* 341 U.S. 367 (1951).

The effect of the Civil Rights Act upon prosecutorial immunity has been considered by five Circuits, all of which have found the immunity to be unaffected by the Act. *Bauers vs. Heisel,* 361 F.2d 581 (3rd Cir. 1966), cert. denied, 386 U.S. 1021 (1967); *Carmack vs. Gibson,* 363 F.2d 862 (5th Cir. 1966); *Gabbard vs. Rose,* 359 F.2d 182 (6th Cir. 1966); *Rhodes vs. Meyer,* 334 F.2d 709 (8th Cir. 1964), cert. denied, 379 U.S. 915 (1969); *Agnew vs. Moody,* 330 F.2d 868 (9th Cir. 1964), cert. denied, 379 U.S. 867 (1964).

A compilation of the many cases which have recognized the continued existence of the judicial and quasi-judicial immunities, despite the passage of the Civil Rights Act, is contained in *Bauers vs. Heisel, supra,* at 586 n. 7.

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4. SINCE THE ACTS COMPLAINED OF CONSTITUTE AN INTEGRAL PART OF THE JUDICIAL PROCESS, THE RESPONDENTS ARE ABSOLUTELY IMMUNE.

Petitioner concedes that Respondents are immune unless the acts complained of are outside of the official duties of a prosecuting attorney such that they no longer constitute an integral part of the judicial process. *Petition,* pp. 4-5 (April 21, 1969).

Petitioner then asserts:

> It can scarcely be contended that the normal functions of a Prosecuting Attorney is [sic] to wilfully and deliberately use perjury to obtain an indictment, or to wilfully and deliberately suppress testimony for the sole purpose of mislead-

> ing a Grand Jury in order that said District Attorney may obtain an indictment. [*Id.* at 5.]

The fallacy in Petitioner's reasoning was pointed out twenty years ago in *Gregoire vs. Biddle,* 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950), when Judge Learned Hand explained:

> . . . . it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. [177 F.2d at 581.]

Petitioner offers *Robichaud vs. Ronan, supra,* in support of his argument, ignoring the fact that the *Robichaud* opinion endorses the concept of prosecutorial immunity (351 F.2d at 536), and also ignoring the fact that two of the three judges who decided *Robichaud* were members of the panel that affirmed the dismissal of Petitioner's complaint in the present action on the ground that it was barred by the doctrine of prosecutorial immunity. *Marlowe vs. Coakley,* 404 F.2d 70 (9th Cir. 1968).

The *Robichaud* case represents nothing more than a refusal to, "extend the doctrine of [prosecutorial]

immunity beyond its purpose." 351 F.2d at 536. In *Robichaud* it was found that a prosecutor who engaged in "police" activity was acting outside of his normal scope of duties and was no longer entitled to the protections accorded a prosecutor. *Id.* at 537.

The present case, on the other hand, involves the presentation of evidence to a Grand Jury, a statutorily prescribed duty of the prosecutor and a cornerstone of the judicial process.

Petitioner fails to grasp the distinction between the allegedly malicious performance of an official prosecutorial duty and the performance of a wholly non-prosecutorial act. This failure is crucial, since the former category of conduct is protected by the immunity, while the latter type of conduct is not. *Lewis vs. Brautigam,* 227 F.2d 124 (5th Cir. 1955).

Petitioner's claim that the acts in question did not constitute a part of the official duties of a prosecutor is apparently based solely on Petitioner's asserted conclusion that Respondents' conduct was motivated by malice. But all of the cases which have considered the matter, including *Robichaud vs. Ronan, supra,* upon which Petitioner places such great reliance, have uniformly held that it is the nature of the act, not the motive or the state of mind of the actor, which determines the existence or non-existence of prosecutorial immunity. 351 F.2d at 536. See, also, 56 *A.L.R.,* 1239 (1928).

5. THE PROSECUTORIAL IMMUNITY SHOULD BE PRESERVED SINCE IT IS BASED ON CONSIDERED REASON AND IMPLEMENTS A DESIRABLE PUBLIC AIM.

Petitioner's suit is clearly barred under the existing state of the law of prosecutorial immunity. Furthermore, this result is desirable.

An excellent statement of the rationale for the privilege is found in the following portion of Judge Learned Hand's opinion in *Gregoire vs Biddle, supra*:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from

> their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation . . . . [177 F.2d at 581.]

The existence of any privilege necessitates a balancing of competing interests. This Court recently had occasion to make the same kind of determination with respect to judges, *Pierson vs. Ray,* 386 U.S. 547 (1967), and concluded:

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that aroused the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making, but intimidation. [386 U.S. at 554.]

The administration of justice requires that prosecuting attorneys, like judges, be able to perform their delegated duties without being hounded and intimidated by unsatisfied litigants. The observations contained in the *Pierson* decision, *supra,* are equally applicable to prosecutors to the extent their actions constitute an integral part of the judicial process.

Prosecutorial immunity is based upon sound reasons; it implements the necessary public policy goal

of keeping the judicial process free from pressure and harassment. It, therefore, should be preserved.

CONCLUSION

For the foregoing reasons, Respondents urge that the petition be denied.

Dated Oakland, California,
May 19, 1969.

Respectfully submitted,
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